

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED HEALTH SERVICES  
CREDIT UNION, a nonprofit  
Washington corporation,

Plaintiff,

vs.

OPEN SOLUTIONS INC., a  
Delaware corporation,

Defendants.

NO. CV-06-0302-EFS

**ORDER GRANTING DEFENDANT'S MOTION  
TO DISMISS COMPLAINT**

On January 24, 2007, a hearing was held in the above captioned matter. Hugh Evans and Patricia Brown were present representing Plaintiff United Health Services Credit Union ("Credit Union"), and Fred Rose, Credit Union's Chief Executive Officer, was also present. William Hyslop was present representing Defendant Open Solutions Inc. ("OSI"). Before the Court was Defendant's Motion to Dismiss Complaint or, Alternatively, to Transfer Venue (Ct. Rec. 3). After reviewing the submitted material and relevant authority and hearing oral argument, the Court was fully informed and granted Defendant's motion. This Order serves to supplement and memorialize the Court's oral ruling.

**BACKGROUND**

CGI Information Systems' ("CGI") and Plaintiff Credit Union negotiated an agreement for the provision of hardware, software,

1 maintenance, and support services effective October 1, 2002, for a term  
2 of 60 months (Ct. Rec. 10 p. 2). The agreement included "Terms and  
3 Conditions of System Acquisition, Terms and Conditions of Software  
4 Maintenance and Support, Terms and Conditions of Disaster Backup  
5 Service, and Proposal" (Ct. Rec. 5-2). In the spring of 2005, Fred  
6 Rose, CEO of the Credit Union, notified CGI of problems with the system  
7 and indicated that unless improvements were made, the Credit Union  
8 intended to look for a different provider for its computer and software  
9 needs (Ct. Rec. 10 p. 2).

10 OSI sent a letter to Credit Union dated May 11, 2005, announcing  
11 that OSI had acquired the assets of CGI and indicating its intent to  
12 continue the agreement between Credit Union and CGI (Ct. Rec. 10 Ex. 1).  
13 The letter sought Credit Union's agreement to CGI's assignment of the  
14 contract to OSI. Fred Rose replied, by letter dated May 13, 2005, that  
15 he did not agree to the assignment (Ct. Rec. 10 Ex. 2). The letter  
16 renewed Mr. Rose's request to convert to another provider and noted his  
17 unsuccessful attempt to acquire information regarding a deconversion  
18 layout. *Id.* By letter dated May 18, 2005, OSI replied that if the  
19 contract terminated, it was entitled to \$55,421.49 as an early  
20 termination fee and \$30,000.00 as a deconversion fee, assuming a  
21 projected deconversion date of November 1, 2005 (Ct. Rec. 10 Ex. 3).  
22 Mr. Rose alleges that Credit Union was forced to pay the amount demanded  
23 in order to have the Credit Union's member information returned (Ct.  
24 Rec. 10 p. 3). Mr. Rose further alleges that compliance with a  
25 deconversion agreement, attached as Exhibit 5 to Mr. Rose's deposition,  
26 was also required by OSI prior to deconversion (Ct. Rec. 10).

1 Credit Union filed its Complaint for Damages in Washington Superior  
2 Court for the County of Spokane alleging extortion, conversion, contract  
3 interference, and consumer protection act violations on September 26,  
4 2006 (Ct. Rec. 1). Defendant removed the case to federal court on  
5 October 31, 2006. *Id.*

6 Defendant seeks dismissal under Federal Rule of Civil Procedure  
7 12(b)(6), failure to state a claim upon which relief may be granted.  
8 Defendant argues Plaintiff's claims fail because (1) the complaint was  
9 filed outside the contractual one-year time limit, and (2) damages can  
10 only be sought under contract law, not under tort law (Ct. Rec. 4).

#### 11 STANDARD OF REVIEW

12 Under Rule 12(b)(6), a cause of action should not be dismissed for  
13 failure to state a claim "unless it appears beyond doubt that the  
14 plaintiff can prove no set of facts in support of his claim which would  
15 entitle him to relief." *Cal. Dump Truck Owners Assoc. v. Assoc. Gen.*  
16 *Contractors of Am.*, 562 F.2d 607, 614 (9th Cir. 1977) (citing *Conley v.*  
17 *Gibson*, 355 U.S. 41, 45 (1957)); *Robertson v. Dean Witter Reynolds,*  
18 *Inc.*, 749 F.2d 530, 534 (9th Cir. 1984). When resolving a Rule 12(b)(6)  
19 motion, the court must (1) construe the complaint in the light most  
20 favorable to the plaintiff, (2) accept all well-pleaded factual  
21 allegations as true, and (3) determine whether plaintiffs could prove  
22 any set of facts to support a claim that would merit relief. *Cahill v.*  
23 *Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Integrated*  
24 *Res. Equity Corp. v. Founders Bank of Ariz.*, 74 F.3d 1246 (9th Cir.  
25 1996). A claim should be dismissed where there is a "lack of cognizable  
26 legal theory" or "absence of sufficient facts alleged under a cognizable  
27

1 legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699  
2 (9th Cir. 1990). If the court finds that the complaint is insufficient  
3 as pled, the court should provide plaintiff with an opportunity to amend  
4 the complaint unless the pleading "could not possibly be cured by the  
5 allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th  
6 Cir. 2000).

#### 7 ANALYSIS AND CONCLUSION

8 The facts of this case present two vastly different potential  
9 approaches to the issues before the Court as demonstrated by the  
10 different analyses in the parties' briefs. From Plaintiff's  
11 perspective, CGI attempted to assign the contract to OSI and Credit  
12 Union objected to the assignment. Because the contract required Credit  
13 Union's assent to the assignment, and Credit Union withheld its assent,  
14 the assignment never took place. Therefore, there was never a contract  
15 in existence between OSI and Credit Union. OSI would have known that  
16 this was a potential consequence of their acquisition of CGI had they  
17 reviewed the portion of CGI's contract with Credit Union barring  
18 assignment of the contract without consent.

19 From Defendant's perspective, OSI acquired the assets of CGI  
20 including contracts with CGI's clients. Pursuant to Credit Union's  
21 contract with CGI, Credit Union had the right to object to the  
22 assignment of the contract to OSI. However, the breach of the non-  
23 assignment clause did not invalidate the entire contract, rather, Credit  
24 Union had a right to seek damages for the breach of the non-assignment  
25 clause. Credit Union was limited with regard to remedies for the breach  
26 by other terms in the contract, most importantly, by the term requiring  
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1 claims for breach to be brought within one year.

2       There is no dispute that a contract existed between CGI and Credit  
3 Union, the dispute turns on how to deal with CGI's attempt to assign the  
4 contract to OSI without Credit Union's consent. The resolution depends  
5 on the framing of the question: Does Credit Union's decision to withhold  
6 consent of the assignment result in a finding that no contract exists  
7 between OSI and Credit Union? Or, does the attempted assignment without  
8 consent constitute a breach of the non-assignment clause of the contract  
9 leaving the rest of the contract in place? In order to make that  
10 determination, the Court must ascertain what law applies to the facts of  
11 the case.

12 1. Applicable Law

13       Determining the applicable law is complicated by the fact that the  
14 contract at issue is a mixed contract for the provision of goods and  
15 services, and contains a choice of law provision requiring the  
16 application of Michigan law although Washington is the forum state.

17       In Washington, an express choice of law contract provision will be  
18 honored, "so long as application of the chosen law does not violate the  
19 fundamental public policy of the forum state." *McGill v. Hill*, 31 Wash.  
20 App. 542, 547 (1982); See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187  
21 (1971). Here the Court finds no public policy reason to abrogate the  
22 parties expressed intent to apply Michigan law: "[t]his Agreement is  
23 governed by Michigan law without regard to the application of its  
24 conflicts of law principles . . . ." (Ct. Rec. 10 at 9, 12, and 15.)  
25 Therefore, the Court will evaluate the dispute in light of applicable  
26 Michigan law.

1 Despite the potential conflict between the Uniform Commercial Code  
2 ("UCC") as applied to contracts for the sale of goods, and common law  
3 contract principles applied to contracts for the provision of services,  
4 an examination of Michigan laws reveals that the result would be the  
5 same under either Michigan's adoption of the UCC or under general  
6 contract law. Michigan Compiled Law 440.2210, the UCC provision  
7 addressing assignment of rights, renders ineffective non-assignment  
8 clauses preventing the assignment contract rights, such as the right to  
9 receive payment. In other words, even if a contract contains a non-  
10 assignment provision, under the UCC, either party is still free to  
11 assign their right to receive payment. However, the law does not  
12 provide guidance with regard to the instant case where one party has  
13 attempted to assign a duty, rather than a right, despite a contract  
14 provision requiring the consent of both parties to ratify such an  
15 assignment. Further, no other UCC provision addresses assignment  
16 clauses generally. Therefore, whether the Court were to find the  
17 contract one for the sale of goods governed by the UCC, or a contract  
18 for services governed by the common law of contract, the Court would  
19 need to rely on general contract principles in order to evaluate the  
20 case.

## 21 2. Impact of an Attempted Assignment Without Consent

22 While Michigan courts have not addressed this issue directly,  
23 Michigan cases provide guidance. In *Wonsey v. Life Ins. Co. of North*  
24 *America*, 32 F.Supp.2d 939 (E.D. Mich. 1998), the Court cited to the  
25 Restatement (Second) of Contracts and noted that "the modern trend with  
26 respect to contractual prohibitions on assignments is to interpret these  
27

1 clauses narrowly . . .” 32 F.Supp.2d at 943. The Restatement directly  
2 addresses the issue at bar: “[a] contract term prohibiting assignment of  
3 rights under the contract, unless a different intention is manifested,  
4 . . . gives the obligor a right to damages for breach of the terms  
5 forbidding assignment but does not render the assignment ineffective.”  
6 RESTATEMENT (SECOND) OF CONTRACTS § 322(2) (1981). Thus, the Restatement  
7 supports OSI’s contention that Credit Union could have sought damages  
8 for the breach of the non-assignment clause, but the assignment itself  
9 is not rendered ineffective.

10 The Restatement articulates a principle that serves to facilitate  
11 commerce generally and comports with other areas of contract law. That  
12 is, breach of one clause of a contract does not invalidate the entire  
13 contract, but permits the non-breaching party to seek damages for the  
14 breach. This portion of the Restatement is qualified by the phrase,  
15 “unless a different intention is manifested.” *Id.* The parties to the  
16 instant contract did not manifest a different intent. The logic of the  
17 Restatement is particularly appropriate in this case where the assets of  
18 CGI have been acquired by a company that intends to assume all of CGI’s  
19 duties.<sup>1</sup>

20 Given the Court’s finding that an appropriate remedy for breach of  
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22 <sup>1</sup> This holding is bolstered by *Ferndale Laboratories, Inc. v.*  
23 *Schwarz Pharma, Inc.*, 123 Fed.Appx. 641 (6th Cir. 2005), an  
24 unpublished opinion. In that case, Ferndale had an agreement with  
25 Reed and Carnick (“R&C”) to supply a prescription cream. *Id.* The  
26 contract contained a clause similar to the instant case barring  
27 assignment without the consent of both parties. *Id.* R&C entered into  
28 an agreement whereby their assets were acquired by Schwarz Pharma, but  
Ferndale did not consent to the agreement. *Id.* Instead of claiming  
that the assignment was ineffective, Ferndale sought damages for  
breach of the non-assignment clause, which the Sixth Circuit granted.  
*Id.*

1 the non-assignment clause was damages rather than voiding the assignment  
2 or the contract, the instant contract remains effective and Credit Union  
3 is bound by other terms of the contract. Specifically, Credit Union was  
4 limited by paragraph 17 of the Terms and Conditions of Software  
5 Maintenance and Support section of the contract, which holds, "CGI  
6 Disclaims, and Credit Union waives, any . . . 4) Claims for which a legal  
7 proceeding against CGI is not filed within one year after such claim  
8 first arose." (Ct. Rec. 5 p. 10.) Here, Credit Union's claims for  
9 breach, either of the non-assignment clause, or any action for breach  
10 with regard to services provided and fees required, arose in May of  
11 2005, when Credit Union received letters from OSI notifying it of CGI's  
12 assignment of the contract to OSI and requesting payment for contract  
13 termination and deconversion. As the one year contract limitation  
14 expired in May of 2006, and this action was not filed until September of  
15 2006, Credit Union is barred from bringing this suit. Allegations of  
16 additional facts will not entitle Credit Union to relief. Therefore,  
17 the Court grants OSI's motion to dismiss.

18 Accordingly, **IT IS HEREBY ORDERED:** Defendant's Motion to Dismiss  
19 Complaint or, Alternatively, to Transfer Venue (**Ct. Rec. 3**) is **GRANTED**.

20 **IT IS SO ORDERED.** The District Court Executive is directed to  
21 enter this Order, furnish copies to counsel, enter judgment in favor of  
22 Defendant, and close this file.

23 **DATED** this 5th day of February 2007.

24  
25 S/ Edward F. Shea  
26 EDWARD F. SHEA  
27 UNITED STATES DISTRICT JUDGE

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